Yap Pun & Anor v Orang-orang yang Tidak Dikenali yang Menduduki di atas tanah yang dikenali sebagai Lot No 108, Seksyen 92A, Bandar Kuala Lumpur

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO S1-24-271 OF 1996
MOHD NOOR AHMAD J
24 OCTOBER 1997

Land Law *— Possession — Recovery of — Whether occupation arises from acquiescence and implied consent — Whether defendants are holders of licence coupled with an equity over the land — Whether there must be some active encouragement or positive act on the part of the landowners before any consent could be inferred*

The plaintiffs applied for possession of a piece of land ('the land'). They later discovered several houses built on the land and occuppied by the defendants. They claimed that the occupation was without the consent of the plaintiffs and their predecessor-in-title. On the other hand, the defendants asserted that they had occupied the land and constructed the houses since the 1940s with the consent of the then Selangor State Government. They were also rendered facilities by several government agencies and had paid assessments. Thus, the defendants contended, their occupation arises from acquiescence and implied consent, and therefore, they are holders of a licence coupled with an equity. At the trial, the defendants' counsel objected to the service of the originating summons and the supporting affidavit for non-compliance with the requirements of O 89 r 4(2) of the Rules of the High Court 1980 ('the RHC').

Held, dismissing the preliminary objection and allowing the application:

(1) The steps taken by the defendants clearly indicate that they had given recognition to the proceedings and therefore there was a waiver of the irregularity. The defendants should have applied earlier to set aside the irregularity under O 2 r 2(1) of the RHC before taking steps to defend the action after becoming aware of the irregularity. As the defendants are before the court and they suffer no prejudice on account of the irregularity, the irregularity is curable under O 2 r 1(1) (see p 274F–H).

(2) At the relevant time, under the National Land Code 1965, the only authority to authorize the occupation of State land is the Land Executive Committee or the Selangor State Authority. The action of government agencies could not bind the committee or the Selangor State Authority with regard to the occupation of the state land (see pp 274I and 275A) *Kabra Holdings Sdn Bhd v Ahmad bin Shahlan & Ors* [1992] 2 CLJ 817; *Sidek bin Haji*

Muhamad & Ors v The Government of The State of Perak & Ors [1982] 1 MLJ 313 and *Government of The State of Negeri Sembilan & Anor v Yap Chong Lan & Ors* [1984] 2 MLJ 123 followed.

(3) With regard to the alleged implied consent and acquiescence on the part of the vendor and the plaintiffs, for the defendants to occupy and continue to occupy the land, there must be some active encouragement or positive act on the part of the vendor or the plaintiffs before any consent could be inferred. Assent of either the predecessor-in-title or the plaintiffs for the defendants to occupy or continue to occupy the land cannot be reasonably inferred from the alleged acquiescence under the circumstances of this case (see p 275G–I); *Shaheen bte Abu Bakar v Perbadanan Kemajuan Negeri Selangor and other appeals* [1996] 1 MLJ 825 and *Tan Siew Chong v Lim Hock Theam & Ors* [1994] 2 CLJ 660 followed.

[Bahasa Malaysia summary

Plaintif-plaintif memohon pemilikan sebidang tanah ('tanah tersebut'). Mereka kemudiannya mendapati beberapa rumah dibina di atas tanah tersebut dan diduduki oleh defendan-defendan. Mereka mendakwa bahawa pendudukan itu adalah tanpa keizinan plaintif-plaintif dan pendulu dalam hakmilik. Sebaliknya, defendan-defendan menegaskan bahawa mereka telah menduduki tanah tersebut dan membina rumah-rumah semenjak tahun 1940 dengan kebenaran Kerajaan Negeri Selangor pada masa itu. Mereka juga diberikan kemudahan oleh beberapa agensi kerajaan dan telah membayar taksiran. Oleh itu, defendan-defendan menegaskan pendudukan mereka timbul daripada akuiesens dan keizinan tersirat, dan dengan itu, mereka adalah pemegang lesen bersama ekuiti. Pada masa perbicaraan, peguam defendan-defendan membantah kepada penyampaian saman pemula dan afidavit sokongan kerana ketidakpatuhan kepada kehendak-kehendak A 89 k 4(2) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT').

Diputuskan, menolak bantahan permulaan dan membenarkan permohonan:

(1) Langkah-langkah yang diambil oleh defendan-defendan dengan jelasnya menunjukkan bahawa mereka telah memberikan pengiktirafan kepada prosiding itu dan dengan itu terdapat pengetepian luar aturan. Defendan-defendan sepatutnya memohon terlebih dahulu untuk mengetepikan luar aturan di bawah A 2 k 2(1) KMT sebelum mengambil langkah untuk membela tindakan itu selepas menyedari luar aturan itu. Oleh kerana defendan-defendan berada di hadapan mahkamah dan mereka tidak mengalami apa-apa kemudaratan oleh sebab luar aturan itu, luar aturan itu boleh dipulihkan di bawah A 2 k 1(1) (lihat ms 274F–H).

(2) Pada masa relevan, di bawah Kanun Tanah Negara 1965, satu-satunya pihak berkuasa untuk memberikan kebenaran pendudukan tanah kerajaan ialah Jawatankuasa Eksekutif Tanah atau pihak berkuasa negeri Selangor. Tindakan agensi kerajaan tidak boleh mengikat jawatankuasa atau pihak berkuasa negeri Selangor berkenaan dengan pendudukan tanah negeri (lihat ms 274I dan 275A); *Kabra Holdings Sdn Bhd v Ahmad bin Shahlan & Ors* [1992] 2 CLJ 817; *Sidek bin Haji Muhamad & Ors v The Government of The State of Perak & Ors* [1982] 1 MLJ 313 dan *Government of The State of Negeri Sembilan & Anor v Yap Chong Lan & Ors* [1984] 2 MLJ 123 diikut.

(3) Berkenaan dengan keizinan tersirat dan akuiesens yang dikatakan di pihak penjual dan plaintif-plaintif, bagi defendan-defendan menduduki dan terus menduduki tanah tersebut, mesti terdapat dorongan yang aktif atau tindakan yang positif di pihak penjual atau plaintif-plaintif sebelum apa-apa keizinan boleh dibuat inferens. Persetujuan sama ada daripada pendulu dalam hakmilik atau plaintif-plaintif untuk defendan menduduki atau terus menduduki tanah tersebut tidak boleh dibuat inferens secara munasabah daripada akuiesens yang dikatakan itu di bawah keadaan-keadaan kes ini (lihat ms 275G–I); *Shaheen bte Abu Bakar v Perbadanan Kemajuan Negeri Selangor and other appeals* [1996] 1 MLJ 825 dan *Tan Siew Chong v Lim Hock Theam & Ors* [1994] 2 CLJ 660 dikut.]

Notes

For a case on recovery of possession of land, see 8 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 2188.

Cases referred to

D & C Bank Bhd v Aspatra Corp Sdn Bhd & Anor and another appeal [1995] 3 MLJ 472 (refd)

Fry v Moore (1889) 23 QBD 395 (refd)

Government of The State of Negeri Sembilan & Anor v Yap Chong Lan & Ors [1984] 2 MLJ 123 (folld)

Kabra Holdings Sdn Bhd v Ahmad bin Shahlan & Ors [1992] 2 CLJ 817 (folld)

Ong Beng Cheng v Chiu Wing Wa [1993] 2 AMR 3313 (refd)

Shaheen bte Abu Bakar v Perbadanan Kemajuan Negeri Selangor and other appeals [1996] 1 MLJ 825 (folld)

Sidek bin Haji Muhamad & Ors v The Government of The State of Perak & Ors [1982] 1 MLJ 313 (folld)

Tan Siew Chong v Lim Hock Theam & Ors [1994] 2 CLJ 660 (folld)

Legislation referred to

Local Government Act 1976 s 163(1)

National Land Code 1965 ss 125(2), 127(1)(a)
Rules of the High Court 1980 O 2 rr 1(1), 2(1), O 89, r 4(2)

David Churme (*Chin & Co*) for the plaintiff.
Yong Yuan Kee (*SK Yap & Sharizal*) for the second defendant.
Wong Poh Leng (*Loo Yoon Choy* with her) (*WK Yap, Loo & Co*) for defendants No 3 to 28.

Cur Adv Vult

Mohd Noor Ahmad J: The plaintiffs applied for possession of land held under State Lease No 2798 Lot No 108, Seksyen 92A Bandar Kuala Lumpur ('the said land') under O 89 of the Rules of the High Court 1980.

The said land was alienated by the Land Executive Committee for the Federal Territory ('the committee') to one Kamaruzzaman bin Ahmad on 13 January 1975 ('the vendor'). Before the alienation, the said land was state land. The plaintiffs purchased the said land from the vendor under a sale and purchase agreement dated 24 February 1997 (see encl (11) exh D). After a protracted legal battle between the plaintiffs and the vendor, the plaintiffs became the registered owners on 10 September 1994. Under the agreement, as the sale was with vacant possession, the vendor was under the obligation to evict an existing Sikh temple from the said land (see preamble (v) and cl 1).

The plaintiffs contended that at the time of the purchase there was only a Sikh temple on the said land. However, it was later discovered that several structures had been built and the defendants had occupied the said lands without the consent of the plaintiffs and their predecessor-in-title (the vendor). On 5 April 1996, the defendants were notified in writing to quit and deliver vacant possession of the said land to the plaintiffs, which the defendants did not comply.

The defendants (except defendant No 2) asserted that they occupied the said land and constructed houses/structures thereon since the 1940s with the consent of the then Selangor State Government. They were supplied with water and electricity and had paid the assessments. After the alienation, they continued to occupy the said land with the implied consent of the plaintiffs' predecessor-in-title (the vendor) because no action was taken to evict them when he was the registered owner thereof for nearly 20 years; and the plaintiffs knew of the existence of the houses/structure and of the defendants' occupation of the said land at the time of the purchase. The second defendant claimed that the plaintiffs knew of the existence of the house occupied by him on the said land for the period of not less than seven years but did not object to his occupation and therefore, the plaintiffs are estopped from alleging that they did not consent to his occupation of the said land. In short, the defendants are contending that their occupation of the said land arises from acquiescence and implied consent, and therefore, they are holders of a licence coupled with an equity.

The defendants' counsel raised a preliminary objection on the impropriety of the service of the originating summons and the supporting affidavit on defendant No 3 to defendant No 28. He contends that the service was not proper because of non-compliance with the requirements of O 89 r 4(2) of the Rules which states:

> The summons shall, in addition to being served on the named defendants, if any, in accordance with paragraph (1) be served, unless the Court otherwise directs, by —
>
> (a) affixing a copy of the summons and a copy of the affidavit to the main door or other *conspicuous* part of the premises; and
>
> (b) if practicable, inserting through the letter box at the premises a copy of the summons and a copy of the affidavit enclosed in sealed envelope addressed to 'the occupiers'.

According to the deponent of the affidavit of service, the documents were affixed to the main door or other conspicous part of the structures, buildings and premises but he could not find any letter box on the said land through which the documents could be inserted. However, the deponents on behalf of the defendants deposed that the documents were never affixed as alleged and claimed that there were letter boxes on the said land as exhibited.

It is evident that the defendants had taken steps to defend the action on the merits when fully aware of the alleged irregularity (see encl (14)). Further, some of the defendants had applied to be joined as a party to the action which was granted (see encls (15) and (16)) and in the supporting affidavit the merits of the defence were setforth.

To my mind, the steps taken by the defendants clearly indicate that they wanted to go into fight in full swing and the issue of irregular services was a matter of the past and no longer an issue (*Fry v Moore* (1889) 23 QBD 395; *D & C Bank Bhd v Aspatra Corp Sdn Bhd & Anor and another appeal* [1995] 3 MLJ 472). In short, the defendants had given recognition to the proceedings and therefore there was a waiver of the irregularity. The defendants should have applied earlier to set aside the irregularity under O 2 r 2(1) of the Rules before taking steps to defend the action after becoming aware of the irregularity. The doctrine of waiver applies to O 89 proceeding (*Ong Beng Cheng v Chiu Wing Wa* [1993] 2 AMR 3313). Anyway, as the defendants are before the Court and they suffer no prejudice on account of the irregularity, I hold that the irregularity is curable under O 2 r 1(1) of the Rules.

Therefore, the preliminary objection is dismissed.

The defendants based their right to occupy the said land before the alienation on the premise that the government agencies, such as the then Lembaga Letrik Negara, the Water Authority and the Dewan Bandaraya Kuala Lumpur supplied them electricity and water and charge them with assessments respectively. Assuming that they had occupied the said land before the alienation, to my mind, under the National Land Code 1965

A the authority to authorize the occupation of State land is only the committee or the Selangor State Authority at the relevant time. Therefore, such action of the said agencies cannot bind the committee or the Selangor State Authority with regard to the occupation of the state land. In *Kabra Holdings Sdn Bhd v Ahmad bin Shahlan & Ors* [1992] 2 CLJ 817, it was held that the promise or representation of the Menteri Besar of Selangor in allowing the defendants to occupy the disputed land did not bind the State Authority. In *Sidek bin Haji Muhamad & Ors v The Government of The State of Perak & Ors* [1982] 1 MLJ 313 and *Government of The State of Negeri Sembilan & Anor v Yap Chong Lan & Ors* [1984] 2 MLJ 123, it was held that the acts of the State Director of Lands and Mines and the collector of land revenue, respectively in giving permission to the settlers to occupy the state lands did not bind the State Authority. The defendants also relied on the provisions of s 163(1) of the Local Government Act 1976 to establish that their occupation of the said land was with the approval of the State Authority. The section provides —

> In the case of buildings situated on State land or on land reserved for a public purpose and not occupied by the Federal or State Governments the local authority, with the approval of the State Authority, may impose the rates referred to in section 127 upon the annual value or improved value of all or any of such buildings, and the occupiers of such buildings shall be liable to pay the said rates.

To my mind, the reliance is misplaced because the 1976 Act was enacted after the said land was alienated to the vendor and the assessment receipts produced related the period before the alienation. Hence, the provisions do not apply. And further, the Local Councils Ordinance 1952 does not have similar provisions. Furthermore, the receipts are in the name of a third party and they relate to a different lot, ie Lot 123, whereas the said land is Lot 108.

Now with regard to the alleged implied consent and acquiescence on the part of the vendor and the plaintiffs, for the defendants to occupy and continue to occupy the said land, there must be some active encouragement or positive act on the part of the vendor or the plaintiffs before any consent can be inferred (*Shaheen bte Abu Bakar v Perbadanan Kemajuan Negeri Selangor and other appeals* [1996] 1 MLJ 825; *Tan Siew Chong v Lim Hock Theam & Ors* [1994] 2 CLJ 660). On the facts, I am satisfied that those elements are absent. In my opinion, the silence or non-action on the part of the vendor and the plaintiffs in the face of the alleged occupation and continued occupation by the defendants of the said land is more probably by reason of the fact that both of them were entangled in the protracted legal battle for so many years and that none could have asserted the right either to evict the defendants from the said land or to prevent any trespass to it until their respective rights had been determined by the court. Therefore, assent of either the vendor or the plaintiffs for the defendants to occupy or continue to occupy the said land cannot be reasonably inferred from the alleged acquiescence under such circumstances.

On the defendants' contention that the plaintiffs have no right to the possession of the said land because of breach of the conditions in the title for not having constructed the building for light industry and therefore, by virtue of the provisions of ss 125(2) and 127(1)(a) of the National Land Code 1965 the said land is liable to forfeiture, suffice for me to say that the contention has no merit because at this junction the plaintiffs are still the registered owners and the machinery for forfeiture by the committee has not been commenced.

This is a proper case for the application of O 89 of the Rules. Therefore, an order in terms of the application is hereby made.

Preliminary objection dismissed; application allowed.

Reported by Loo Lai Mee